The 3E Company, Inc. *and* International Brotherhood of Electrical Workers, Local Union #567, AFL–CIO. Case 1–CA–32929

February 12, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND FOX

On July 29, 1996, Administrative Law Judge Michael O. Miller issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions,[2] and to adopt the recommended Order, which is modified to reflect the amended remedy below.[3]

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge, at fn. 9 of his decision, quoted the Board as stating in *Manno Electric, Inc.*, 321 NLRB 278, 280 fn. 12 (1996), that it would "no longer be appropriate to term the General Counsel's burden that of mounting a prima facie case; his burden is to persuade the Board that the employer acted out of union [sic] animus." We note, however, that the Board in that case actually was quoting from the D.C. Circuit Court's decision in *Southwest Merchandising Corp. v. NLRB*, 53 F.3d 1334, 1340 fn. 8 (1995), suggesting that the Board take this approach in light of *Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 275–277 (1994). The Board also stated there, as the judge stressed, that "[t]his change in phraseology does not represent a substantive change in the *Wright Line* test." In any event, we find that correction of the judge's incorrect attribution of the quotation set out above does not affect our ultimate conclusions in this case.

[2] We note that the judge, at sec. II,C, par. 1, stated that "Respondent acknowledged that the applicants met the statutory definition of employees [fn. omitted]." Although the record may not unambiguously show that the Respondent "acknowledged" this fact at the hearing, we find that the 37 applicants involved here clearly were employees under the Act based on the Supreme Court's decision in *NLRB v. Town & Country Electric*, 116 S.Ct. 450 (1995).

Additionally, in adopting the judge's finding that the Respondent violated Sec. 8(a)(3) by failing and refusing to consider for hire 37 job applicants because of their union affiliation, we find it unnecessary to rely on the judge's characterization of the 37 applicants' qualifications for employment at sec. II,F, par. 3. We note, however, that the General Counsel introduced into evidence at the hearing the resumes of these applicants which show on their face that all of them are experienced electricians.

[3] As the General Counsel has requested, we shall modify the judge's remedy in accordance with our recent decision in *B E & K Construction Co.*, 321 NLRB 561 (1996).

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order that it cease and desist, and take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to consider 37 applicants for employment, we shall order the Respondent to consider them for hire and to make whole those discriminatees whom the Respondent would have hired for the job openings that existed at its Portland, Maine jobsite for any losses sustained by reason of the discrimination against them, including amounts they would have earned on other jobs to which the Respondent subsequently would have assigned them. If it is shown at the compliance stage of this proceeding that the Respondent, but for the discrimination, would have assigned any of these discriminatees to present jobs, the Respondent shall hire those individuals and place them in positions substantially equivalent to those for which they applied. Furthermore, as for the remaining discriminatees who would not have been hired for those jobs at the Respondent's Portland jobsite, if it is shown at the compliance stage that the Respondent would have hired any of these discriminatees to fill job openings that later became available at the Portland site or other projects of the Respondent, the Respondent shall also make them whole for the discrimination found and place them in positions substantially equivalent to those for which they applied at the Portland site. In all instances, backpay shall be computed on a quarterly basis as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and shall be reduced by net interim earnings, with interest computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, The 3E Company, Inc., Old Town, Maine, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a) and reletter subsequent paragraphs.

"(a) Consider for hire those discriminatees named below whom the Respondent discriminatorily failed to consider for hire and make whole those discriminatees whom the Respondent would have hired for the job openings that existed at its Portland, Maine jobsite, for any losses sustained by reason of the discrimination against them, including amounts they would have earned on other jobs to which the Respondent subsequently would have assigned them, as set forth in the amended remedy section of this decision. If it is shown at the compliance stage of this proceeding that the Re-

spondent, but for the discrimination, would have assigned any of these discriminatees to present jobs, the Respondent shall hire those individuals and place them in positions substantially equivalent to those for which they applied. Furthermore, as for the remaining discriminatees who would not have been hired for those jobs at the Respondent's Portland jobsite, if it is shown at the compliance stage that the Respondent would have hired any of these discriminatees to fill job openings that later became available at the Portland site or other projects of the Respondent, the Respondent shall also make them whole for the discrimination found in the manner set forth in the amended remedy section and place them in positions substantially equivalent to those for which they applied at the Portland site.

Mark A. Arsenault	Keith E. Hillock
Richard E. Aube	Clifford A. Hoeft
Bobby G. Bailey	Christopher Kelley
Sarah J. Bales	Wilfred Lachance
Fred S. Bell	Richard D. Libbey
Nelson I. Binette	Scott Loweree
Louis J. Bouchard III	Robert P. Martin
Joseph M. Bradley	Milton O. McBreairty
Scott Clockedile	Gregory A. O'Clair
William J. Clough	Richard L. Parsons
Ralph L. Corbin	Louis A. Poirier
Shawn R. Doiron	Richard C. Provencher
Gene A. Ellis	Willis J. Robbins
Charles N. Fraser	Robert A. Shaw
Robert A. Gervais	Paul A. St. Pierre
George Gudbrandsen	Gregory L. Strout
Michael F. Hafner	Daniel J. Thibodeau
Gary Hanmer	David W. Twitchell
David R. Harris''	

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail or refuse to consider for hire those employee-applicants whose applications or resumes are submitted by International Brotherhood of Electrical Workers, Local Union #567, AFL–CIO or any other union or who indicate on their resumes or applications that they are affiliated with or supportive of a union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL consider for hire those discriminatees named below whom we discriminatorily failed to consider for hire, and WE WILL make whole those discriminatees whom we would have hired for the job openings that existed at our Portland, Maine jobsite for any losses sustained by reason of the discrimination against them, including amounts they would have earned on other jobs to which we subsequently would have assigned them, with interest. If it is shown at the compliance stage of this proceeding that, but for the discrimination, we would have assigned any of these discriminatees to present jobs, we shall hire those individuals and place them in positions substantially equivalent to those for which they applied. Furthermore, as for the remaining discriminatees who would not have been hired for those jobs at our Portland jobsite, if it is shown at the compliance stage that we would have hired any of these discriminatees to fill job openings that later became available at the Portland site or at our other projects, we shall also make them whole for the discrimination found, with interest, and place them in positions substantially equivalent to those for which they applied at the Portland site.

Mark A. Arsenault	Keith E. Hillock
Richard E. Aube	Clifford A. Hoeft
Bobby G. Bailey	Christopher Kelley
Sarah J. Bales	Wilfred Lachance
Fred S. Bell	Richard D. Libbey
Nelson I. Binette	Scott Loweree
Louis J. Bouchard III	Robert P. Martin
Joseph M. Bradley	Milton O. McBreairty
Scott Clockedile	Gregory A. O'Clair
William J. Clough	Richard L. Parsons
Ralph L. Corbin	Louis A. Poirier
Shawn R. Doiron	Richard C. Provencher
Gene A. Ellis	Willis J. Robbins
Charles N. Fraser	Robert A. Shaw
Robert A. Gervais	Paul A. St. Pierre
George Gudbrandsen	Gregory L. Strout
Michael F. Hafner	Daniel J. Thibodeau
Gary Hanmer	David W. Twitchell
David R. Harris	

THE 3E COMPANY, INC.

William F. Grant, Esq., for the General Counsel.
Malcolm E. Morrell Jr., Esq., for the Respondent.
Gene A. Ellis, Organizer, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL O. MILLER, Administrative Law Judge. This case was tried in Bangor, Maine, on April 25, 1996, based upon a charge which was filed on May 11, 1995, by International Brotherhood of Electrical Workers, Local Union #567, AFL–CIO (the Union or Local 567) and a complaint which was issued by the Regional Director for Region 1 of the National Labor Relations Board (the Board) on June 26, 1995. The complaint alleges that The 3E Company, Inc. (3E or Respondent) violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act) by refusing to consider 37 employee applicants for hire because of their union affiliation. Respondent's timely filed answer denies the commission of any unfair labor practices.

On the entire record,[1] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, with an office and place of business in Old Town, Maine, and jobsites elsewhere in the State of Maine is engaged as an electrical contractor in the construction industry. Annually, Respondent purchases and receives goods and materials valued in excess of $50,000 at its Old Town, Maine facility directly from points located outside the State of Maine. The Respondent admits and I find and conclude that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

3E is a small electrical contractor based in Old Town, Maine. Its president and owner is Kenneth Wood; its vice president and general manager is Donald Spencer. 3E's employee complement varies according to the work available; it has about 15 employees who comprise what it refers to as its regular cadre of employees. Prior to 1973, it recognized a union which represented its employees. Since then, however, it has been a nonunion, or "merit shop" employer, affiliated, at least in some years with the Associated Builders and Contractors (ABC).

The business is run on a day-to-day basis by Spencer. He bids and manages the various jobs and does all of the interviewing, hiring, and discharging of employees. As a general rule, he operates independently, neither discussing those day-to-day aspects with Wood nor seeking Wood's immediate approval. Wood is involved in the financial operations of the business. He participates in some aspects of the bidding, is aware of what projects are underway or ongoing and knows who is employed inasmuch as he signs pay checks. Wood is not involved in the hiring process and would not know, at any given time, whether the Company is in a hiring posture or who among Respondent's regular cadre might be on layoff. To determine this, Wood would have to consult with Spencer. They have offices in the same building but communicate sparingly. Spencer comes in early and leaves for the field about the time Wood comes in. He returns from the field about the time Wood leaves the office.

Wood and Spencer were the only witnesses testifying herein; Wood as the General Counsel's witness under Rule 611(c) of the Federal Rules of Civil Procedure, Spencer as Respondent's witness.

B. *Hiring Practices*

Respondent's hiring practices are set out in a document entitled "Merit Shop Hiring Policies" and were developed around 1980, based upon advice received from the ABC. It states that the Employer does not discriminate on the basis of union affiliation or other protected classifications; it also provides that "no employee is required to pay dues to any labor organization" in order to acquire employment. More specifically, it states:

> 3. We accept job applications only when we know there are jobs available and when we intend to fill the position(s). . . . Applications remain on file for *30* days.
>
> 4. We do not accept group applications or photocopied forms. We hire based on personal contact with individuals . . . .

Wood acknowledged that Respondent might vary from its practice of accepting applications only when there were job openings. Thus, if an individual made the effort and took the time to come to Old Town, Maine, to submit an application, he said, he or she would be allowed to do so even if no jobs were presently available. As he described it, they try to follow the established practice but "can't get real hard and fast on everything. We got to be a little bit loose."

Sometimes, Respondent receives resumes in the mail. It is Spencer's practice is to throw them away, giving them no consideration. It is also his practice to prefer employees who had previously worked for 3E.

C. *Rejection of the Union-Submitted Resumes*

On April 14, 1995,[2] Gene Ellis, Local 567's organizer, sent Respondent 37 resumes, all from journeymen electricians, including himself and one other full-time representative/organizer. He addressed them to James Lamson at 3E and asked that Respondent accept the resumes for positions with the Company. His letter noted that, in addition to doing an excellent job for the Company, "[t]hey will also be exercising their protected Section 7 rights to organize your workers and your company." The General Counsel acknowledged that these applications were submitted under the Union's "salting" program. Respondent acknowl-

[1] Certain errors in the transcript have been noted and corrected.

[2] All dates hereinafter are 1995 unless otherwise specified.

edged that the applicants met the statutory definition of employees.[3]

Lamson had left 3E to start his own business about a month before the resumes were received. The packet thus came to Wood, on April 15. When he received them, he pointed them out to Spencer, referring expressly to the 37 attached resumes, and asking, "I wonder what this is all about?" Spencer was on his way out and did not have time to discuss or examine them. Wood did not ask Spencer whether there were any job openings; neither did he inquire about the status of any employees who might be on layoff.

On April 20, Wood returned the resumes to the Union. His cover letter noted that they had not been accompanied by any employment applications but did not indicate that completion of a formal application form was required. He also wrote:

> 3-E is not presently hiring electricians. In fact, 3-E still has some of its regular cadre employees on layoff status.
>
> Since we are not hiring and do not maintain a list of potential applicants, we are returning the above resumes to you.

Wood told Spencer "that he had responded to the 37 resumes;" he did not say, and Spencer did not ask, what that response had been.

D. *Hiring Posture*

Respondent readily admits that Wood's response was in error, albeit an allegedly innocent one, as to both the present hiring and layoff situations. In fact, Respondent had only one helper and none of its regular journeymen electricians on layoff and was hiring at the very time that the resumes had been received.

Respondent had at least two on-going projects, a courthouse in Portland, Maine, and expansion of a General Electric plant in Bangor, Maine. Two regular cadre employees who had been working on the courthouse in Portland were transferred back to Bangor and there were thus two openings for journeymen electricians in Portland. One position was filled by Tobie Devoe, the other by Dan Veilleux.

Tobie Devoe had called Respondent around April 19. Spencer told him that the hiring practices required him to come in and submit an application. Devoe came in, probably on that same day. He filled out an application and was interviewed by Spencer. Spencer was "very impressed" by Devoe and hired him. Devoe began work around April 24, on the Portland jobsite.

Dan Veilleux had applied for work with Lamson's new company. However, he sought a day job and Lamson only had an opening for someone willing to work nights. Lamson had worked on Respondent's Portland jobsite, and had continued to oversee it, occasionally, for Respondent after he left its employ. He was familiar with 3E's need for another journeymen electrician and called Spencer to recommend Veilleux. Spencer then called Veilleux and invited him to come in for an interview. Veilleux was interviewed on May 4 and hired on May 12, also for the Portland jobsite.

E. *Evidence Respecting Animus*

There is no overt evidence of animus on this record. The General Counsel, however, points to Respondent's prior Board case as establishing the animus requisite to a *Wright Line*[4] analysis of alleged discrimination. In that case,[5] Werner, a first-line supervisor, was found to have interrogated employees concerning their union activities, made disparaging remarks about employees engaged in such activities and threatened to retaliate against employees so engaged. That conduct occurred in April 1991. There was no participation in these unfair labor practices by management above that supervisor.[6] Indeed, it was shown therein that higher management was aware of the union activity on the jobsite and of the prounion leanings or membership of several employees.[7]

Respondent has also adduced evidence to the effect that Spencer has hired, and continues to employ as part of Respondent's regular cadre, two individuals known to him to be union members. He did not know whether they had maintained their union affiliation; no evidence was adduced to demonstrate that they had not.

Additionally, when he knew that Devoe was going to quit in July, Spencer called the Augusta, Maine IBEW local, seeking job applicants. Two men made application and both were called to come back for interviews. Only one came back, Charles Fraser, on July 14. A day earlier, however, a prior employee, Andy Cote, had come in and was interviewed. Consistent with Respondent's practice, Cote, the former employee was hired to fill the single opening. Subsequently, when Veilleux also quit, Spencer called Fraser to offer him the position. Fraser accepted but then begged off, stating that he had another commitment.[8]

F. *Analysis*

The General Counsel contends that Respondent discriminatorily failed to consider any of the 37 journeymen electricians whose resumes the Union had submitted on April 15. Respondent does not dispute that it gave those resumes no consideration; it contends, however, that its failure was caused by a simple mistake, not motivated by discrimination. Wood, it argues, was unaware of Spencer's intention to hire employees at that time.

Discrimination in refusing to consider applicants for hire is discrimination in regard to hire within the ambit of Section 8(a)(3). Such discrimination is proved by showing:

---

[3] *NLRB v. Town & Country Electric*, 116 S.Ct. 450 (Nov. 28, 1995).

[4] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981).

[5] *3E Co.*, 313 NLRB 12 (1993).

[6] At that time, Lamson was vice president of Respondent's southern division and Werner's immediate superior. The Board disavowed the judge's conclusion that Lamson had "implicitly authorized" Werner's unlawful conduct.

[7] In that case, and again herein, Respondent referenced an earlier charge, Case 1–CA–28206, filed April 19, 1991, which had alleged that it discriminatorily failed to hire 20 applicants referred by the Union for employment. That charge was dismissed on June 6, 1991, and the Union's appeal from that dismissal was denied on July 25, 1991. In dismissing the charge, the General Counsel noted the absence of union animus on the part of the Employer. Neither the dismissal of that charge nor the General Counsel's conclusion that the investigation revealed no evidence of animus at that time, adds appreciably to the record herein.

[8] Spencer's credibly offered testimony is unrebutted.

> (1) that the employer is covered by the Act; (2) that the employer at the time of the purportedly illegal conduct was hiring or had concrete plans to hire employees; (3) that anti-union animus contributed to the decision not to consider, interview or hire an applicant; and (4) that the applicant was a bona fide applicant.

NLRB v. Ultrasystems Western Constructors, 18 F.3d 251, 256 (4th Cir. 1994), enfg. in part, denying enforcement in part, and remanding *Ultrasystems Western Constructors [I]*, 310 NLRB 545 (1993), quoted in *Ultrasystems Western Constructors [II]*, 316 NLRB 1243 (1995). As in all cases of discrimination, *Wright Line*, supra, provides for analytical mode and determines the allocations of burdens of proof. Under that test:

> [T]he Board has always required the General Counsel to persuade that antiunion sentiment was a substantial factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity.

Manno Electric, 321 NLRB 278, 280 fn. 12 (1996).[9]

Here, the General Counsel has shown that the Employer falls within the Board's jurisdiction and that the Employer was hiring at the very time that the applications were submitted. Further, he has shown that the Union submitted resumes of 37 highly skilled and well experienced journeymen electricians whom, I must presume, were all bona fide applicants.[10]

The difficult factor to prove here, as it is in many *Wright Line* cases, is animus. The prior case, involving one first-level supervisor on a project 4 years earlier, is some evidence of animus. It is balanced off by other evidence indicating that higher management has knowingly employed persons known to have union affiliations on that same job and as part of its regular cadre of employees. Of less weight in establishing an absence of animus is Spencer's seeking out of applicants from the Union, and his offering of a job to a union-referred applicant, after issuance of this complaint. There is no way for a trier of fact to evaluate whether such conduct was entirely well intentioned or was undertaken because of the complaint, in an effort to negate other negative evidence.

Thus, we are left with the events themselves and the conclusions which may be inferred from them. Inferences of animus and discriminatory motivation may be warranted under all the circumstances of a case; even without direct evidence. Evidence of suspicious timing, false reasons given in defense and the failure to adequately investigate alleged misconduct all support such inferences. *Adco Electric*, 307 NLRB 1113, 1128 (1992), enfd. 6 F.3d 1110 (5th Cir. 1993); *Electronic Data Systems Corp.*, 305 NLRB 219 (1991); *Visador Co.*, 303 NLRB 1039, 1044 (1991); *Associacion Hospital Del Maestro*, 291 NLRB 198, 204 (1988); and *Clinton Food 4 Less*, 288 NLRB 597, 598 (1988).

In this case, Wood, Respondent's president, received the packet of resumes. He responded to them notwithstanding that he was not the officer involved in any aspect of the hiring process. In doing so, he misstated both the Employer's hiring posture and the layoff status of its regular employees, thereby misleading the Union. He did so without consulting the officer who was engaged in hiring, who would have had the correct information, even though they have offices in the same building, saw each other daily, had seen each other on the day the resumes were received, and had spoken, albeit briefly, about those resumes both upon their receipt and when Wood responded to them. Further, Wood waited 5 days before returning the resumes with his misleading letter. During that time, he most assuredly could have secured accurate information. I am compelled to conclude from these circumstances, that Wood's motivation stemmed from the source of the resumes, the Union. Nothing else explains the short shrift he gave them; nothing else explains the misinformation given when more accurate information was so readily available; and nothing else explains why he would have assumed a role in the hiring process, contrary to Respondent's regular practice. The administrative law judge may be precluded from substituting his own business judgment for that of an employer but he need not be naive.

The last question is whether Wood's returning of the resumes to the Union was consistent with Spencer's practice of throwing resumes away, without consideration. I find that it was not, particularly noting that Wood returned them, and, in doing so, availed himself of an opportunity to mislead the Union, as discussed above. Such misinformation would tend to discourage the Union or the individual applicants from pursuing job opportunities with Respondent. I further note that Respondent did not follow its hiring practices with any rigidity. Applicants who came in when there was no hiring were allowed to make application, applicants who called were invited to come in to file an application and applicants who were referred by some others were solicited to make application. Nothing in Respondent's practice would have precluded Spencer from going through the resumes and soliciting applications from the most desirable among them.

On balance, I therefore find that, for discriminatory reasons, Respondent treated the union-submitted resumes differently than other inquiries for employment and failed to consider the applicants named therein for employment, in violation of Section 8(a)(3).

CONCLUSIONS OF LAW

1. The 3E Company, Inc. is an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By discriminatorily failing to consider for hire those individuals referred to it by International Brotherhood of Electrical Workers, Local Union #567, AFL–CIO the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

[9] Therein, the Board prefaced this exposition of the test by stating that it would "no longer be appropriate to term the General Counsel's burden that of mounting a prima facie case; his burden is to persuade the Board that the employer acted out of union animus. . . . This change in phraseology does not represent a substantive change in the *Wright Line* test."

[10] I note that at least one of those whose resumes the Union had submitted, Richard D. Libbey, had previously worked for 3E, from June 1991 to April 1993.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily failed to consider employees for hire, it must consider their resumes and "provide backpay to those it would have hired but for its unlawful conduct." *Ultrasystems Western Constructors [II]*, supra. In addition, if at the compliance stage of this proceeding it is determined that the Respondent would have hired any of the [37] employee-applicants,[11] the inquiry as to the amount of backpay due these individuals will include any amounts they would have received on other jobs to which the Respondent would later have assigned them. Id. Finally, if at the compliance stage it is established that the Respondent would have assigned any of these discriminatees to current jobs, "[Respondent shall be ordered] to hire those individuals and place them in positions substantially equivalent to those for which they applied . . . ." Id.[12] *H. B. Zachry Co.*, 319 NLRB 967 (1995).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[13]

ORDER

The Respondent, The 3E Company, Inc., Old Town, Maine, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to consider for hire those whose applications or resumes are submitted by International Brotherhood of Electrical Workers, Local Union #567, AFL–CIO or any other union or who indicate on their resumes or applications that they are affiliated with or supportive of a union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole the employee-applicants named below for any losses they may have suffered by reason of the Respondent's discriminatory refusal to consider them for hire in the manner described in this Decision and Order. Offer those employee-applicants named below, who would currently be employed but for the Respondent's unlawful refusal to consider them for hire, employment in the positions for which they applied or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges to which they would have been entitled if they had not been discriminated against by the Respondent.

Gene A. Ellis	Charles N. Fraser
Mark A. Arsenault	Richard E. Aube
Bobby G. Bailey	Sarah J. Bales
Fred S. Bell	William J. Clough
Scott Clockedile	Joseph M. Bradley
Louis J. Bouchard III	Nelson I. Binette
Ralph L. Corbin	Shawn R. Doiron
Robert A. Gervais	George Gudbrandsen
Michael F. Hafner	Gary Hanmer
David R. Harris	Keith E. Hillock
Clifford A. Hoeft	Christopher Kelley
Wilfred Lachance	Richard D. Libbey
Scott Loweree	Robert P. Martin
Milton O. McBreairty	Gregory A. O'Clair
Richard L. Parsons	Louis A. Poirier
Richard C. Provencher	Willis J. Robbins
Robert A. Shaw	Paul A. St. Pierre
Gregory L. Strout	Daniel J. Thibodeau
David W. Twitchell	

(b) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Within 14 days after service by the Region, post at its facilities in Old Town, Maine, and at its other jobsites within the State of Maine copies of the attached notice marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 11, 1995.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[11] At most, it appears that there were only two job openings when these applications were submitted.

[12] Should any of these employee-applicants be entitled to backpay, it shall be calculated in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[13] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[14] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."